

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 13, 2003

STATE OF TENNESSEE v. COY J. COTHAM, JR.

Appeal from the Criminal Court for Davidson County
Nos. 2002-A-451, 2002-A-429 Cheryl Blackburn, Judge

No. M2002-02909-CCA-R3-CD - January 15, 2004

The defendant, Coy J. Cotham, Jr., charged with criminal impersonation and aggravated assault, pled guilty to criminal impersonation, a Class B misdemeanor, see Tenn. Code Ann. § 39-16-301, and simple assault, a Class A misdemeanor, see Tenn. Code Ann. § 39-13-101. The trial court imposed concurrent sentences of six months for criminal impersonation and 11 months and 29 days for simple assault. The sentences were ordered to be served consecutively to an earlier six-year sentence of probation for aggravated assault, on which the defendant had absconded. In this appeal of right, the defendant asserts that the trial court erred by (1) ordering his sentences be served consecutively to his earlier six-year sentence for aggravated assault and (2) denying an alternative sentence. The judgments are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Amy Harwell (at trial) and William J. Steed (on appeal), Nashville, Tennessee, for the appellant, Coy Jonathan Cotham, Jr.

Paul G. Summers, Attorney General & Reporter; Christine M. Lapps, Assistant Attorney General; and Bret T. Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On January 3, 2002, between 3:00 and 4:00 A.M., the defendant picked up the victim, Miranda Lynn Owen, at her workplace and took her to his motel room at Motel 6 on Trinity Lane in Nashville so that she would help him “pack his stuff.” Apparently, the victim chose not to assist the defendant and an argument ensued. After knocking her onto the bed, the defendant struck the victim in the head, forced her to the floor, and kicked her “maybe four or five times.” The defendant then choked the victim until she was unconscious and packed his belongings. When the victim regained consciousness, the defendant walked her to his car and drove to her residence, where she

slept until she left for work that night. Because the victim complained of “blackouts . . . dizzy spells . . . [and] seizures” while at her workplace, a co-worker took her to Baptist Hospital. Meanwhile, when the victim did not return to her residence, the defendant, identifying himself as Andrea Corey Howart, telephoned police to report the victim missing. He later explained that he provided the alias in order to avoid any possible probation violation and because, “I didn't see the relevance of him evening knowing my name.” In September 2002, the defendant entered guilty pleas to criminal impersonation and simple assault.

In this appeal, the defendant asserts that the trial court erred by requiring that his sentences be served consecutively to a previous six-year sentence for an aggravated assault conviction. He also insists that he should have been granted an alternative sentence. The state contends that consecutive sentencing was appropriate because the defendant had an extensive record of criminal activity and was on probation at the time of the underlying offense. See generally State v. Desirey, 909 S.W.2d 20 (Tenn. Crim. App. 1995).

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). The presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). “If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls.” State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant’s potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Tennessee Rule of Criminal Procedure 32, which addresses sentencing where the defendant has prior unserved sentences, provides in pertinent part as follows:

If the defendant has additional sentences not yet fully served as the result of convictions in the same court or in other courts of this state and if this fact is made known to the court prior to sentencing, the court shall recite this in the judgment setting sentence, and the sentence imposed shall be deemed to be concurrent with the prior sentence or sentences, unless it affirmatively appears that the new sentence being imposed is to be served consecutively with the prior sentence or sentences. The judgment to make the sentences consecutive or concurrent shall explicitly recite the judge's reasons therefore, and is reviewable on appeal. Should prior unserved

in-state sentences not be called to the attention of the trial judge by or on behalf of the defendant at the time of sentencing, and set out in judgment setting the new sentence, the new sentence shall be deemed to be consecutive to any such undisclosed prior unserved sentence or sentences; and this rule shall also apply when the defendant is convicted of a misdemeanor while on parole from a prior sentence, and the parole is subsequently revoked. If the defendant has additional sentences or portions thereof to serve, as the result of conviction in other states or in federal court, the sentence imposed shall be consecutive thereto unless the court shall determine in the exercise of its discretion that good cause exists to run the sentences concurrently and explicitly so orders.

Tenn. R. Crim. P. 32(c)(2).

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

Consecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted this cautionary language. Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria¹ exist:

- (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no

¹ The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

- regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
 - (6) The defendant is sentenced for an offense while on probation; or
 - (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

The length of the sentence, when consecutive in nature, must be “justly deserved in relation to the seriousness of the offense,” Tenn. Code Ann. § 40-35-102(1), and “no greater than that deserved” under the circumstances, Tenn. Code Ann. § 40-35-103(2); State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

Because the defendant was on probation when he committed the two offenses on appeal, he qualifies for the consecutive sentencing imposed by the trial court. See Tenn. Code Ann. § 40-35-115(b)(6). Moreover, the defendant's extensive record of criminal history further supports the trial court's ruling that the defendant serve his sentences consecutively. See Tenn. Code Ann. § 40-35-115(b)(2). At the sentencing hearing, it was established that the defendant, who was 24 years of age, had five prior convictions for assaulting the mother of one of his four children, one conviction for the aggravated assault of a police officer, and one conviction for statutory rape. In our view, the aggregate term of 11 months and 29 days imposed consecutively to the defendant's absconded sentence of six years' probation is warranted.

The defendant also argues that the trial court erred by denying an alternative sentence. In misdemeanor sentencing, the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. The sentence must be specific and consistent with the purposes of the Act. Tenn. Code Ann. § 40-35-302(a), (b). Not greater than 75 percent of the sentence should be fixed for service by a misdemeanor offender; however, a DUI offender may be required to serve the full one hundred percent of his sentence. Tenn. Code Ann. § 40-35-302(d); Palmer v. State, 902 S.W.2d 391, 393-94 (Tenn. 1995). In determining the percentage of the sentence, the court must consider enhancement and mitigating factors as well as the legislative purposes and principles related to sentencing. Tenn. Code Ann. § 40-35-302(d).

Upon service of the required percentage, the administrative agency governing the rehabilitative programs determines which among the lawful programs available is appropriate. The trial court retains the authority to place the defendant on probation either immediately or after a term of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). The legislature has encouraged courts to consider public or private agencies for probation supervision prior to directing supervision by the Department of Correction. Tenn. Code Ann. § 40-35-302(f). The statutory

scheme is designed to provide the trial court with continuing jurisdiction in the misdemeanor case and a wide latitude of flexibility. The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Appellate review of misdemeanor sentencing is de novo with a presumption of correctness. See State v. Troutman, 979 S.W.2d 271 (Tenn. 1998).

In denying an alternative sentence, the trial court placed particular emphasis on the defendant's prior convictions for domestic violence. Concluding that "it's clear to me you don't understand that you have a major, major problem with anger, with women, with anybody that gets in your way," the trial judge rejected the defendant's assertion that he had "learned how to deal with anger itself . . . a natural emotion." The trial court denied an alternative sentence for two reasons: the defendant's extensive criminal history, see Tenn. Code Ann. § 40-35-115(2), and the lack of success in utilizing measures less restrictive than confinement, see Tenn. Code Ann. § 40-35-115(6). The defendant acknowledged that on four different occasions, he had been charged with assaulting each of the four mothers of his children. Further, the defendant admitted that his court-ordered domestic violence counseling was terminated when he "argued" with the female counselor while he was on probation for assaulting another female with a baseball bat. Under these circumstances, it is our view that the trial court did not err by ordering a fully incarcerative sentence.

Accordingly, the judgments of the trial court are affirmed.

GARY R. WADE, PRESIDING JUDGE